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Supreme Court, U.S.
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No. 93-1501

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

SHARON ANN ZIEGLER,
Petitioner, Pro Se,

v.

THE SUPREME COURT OF DELAWARE, et al.,
and THE BOARD OF BAR EXAMINERS OF THE
STATE OF DELAWARE, et al.,
Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of Delaware

PETITIONER'S REPLY BRIEF

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May 6, 1994

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On Petition For Writ Of Certiorari
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PETITIONER'S REPLY BRIEF

The Respondents, the Delaware Supreme Court and the Board of Bar Examiners of the State of Delaware (hereinafter "Board"), have not shown any basis for the denial of certiorari.

I. The United States Supreme Court can assume jurisdiction over this matter despite contrary assertions by the Delaware Supreme Court and the Board of Bar Examiners of the State of Delaware.

First, the Delaware Supreme Court contends that the

United States Supreme Court lacks jurisdiction because the Delaware Supreme Court order is not final due to a remand for further proceedings. The lower court argues that Petitioner "fails to explain how her case fits" into one of the Cox Broadcasting categories, *Delaware Supreme Court Opp.* at 7-8.

The Delaware Supreme Court order is a final judgment within the meaning of 28 U.S.C. sec. 1257(a) and falls within the third category of cases delineated by the United States Supreme Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975). This category involves cases that have finally decided all the federal issues but include a remand for further proceedings. Further review of the federal issues in these kinds of cases is unattainable. See also, *North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

If the United States Supreme Court does not assume jurisdiction over this matter, Petitioner's due process rights will be irreparably lost. See, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The Delaware Supreme Court has finally decided Petitioner's federal constitutional claims respecting the arbitrary, unconstitutional grading and administration of the 1993 Delaware Bar Exam. The remand pertains solely to the collateral matter of the tape recording. The Board acknowledges this by maintaining that the issue for remand "was *not* a ground for the Delaware Supreme Court's refusal of her appeal," *Board Opp.* at 8. Therefore, based on legal precedent and based on all the foregoing contentions, made by both the Petitioner and the Board, the Delaware Supreme Court order is a final judgment.

Second, the Board argues that this Court lacks jurisdiction because Petitioner did not raise a valid federal constitutional claim, *Board Opp.* at 2. The Board, however, grounds this argument in the misplaced view that Petitioner is generally challenging the use of essay questions as unreliable because there is always an element of subjectiveness involved in grading them. The Board has completely misconstrued Petitioner's allegations. Petitioner has never alleged honest errors of judgment or unavoidable mistake inherent in subjective grading, *Board Opp.* at 3. Correctly stated, Petitioner asserted that the grading of the 1993 Delaware bar exam was arbitrary and in violation of her constitutional rights because the Examiners did not utilize and consistently apply any point scoring system in grading the exams. Therefore, the cases cited by the Board in support of their arguments are distinguishable because they do not correspond to the actual arguments made in this case. *Board Opp.* at 2-3, *Tyler Vickery,* 517 F.2d 1089 (5th Cir. 1975), *cert. denied,* 426 U.S. 940 (1976), *Whitfield v. Illinois Bd. of Law Examiners,* 504 F.2d 474 (7th Cir. 1974), *Feldman v. State Bd. of Law Examiners,* 438 F.2d 699 (8th Cir. 1971) and *Chaney v. State Bar of Cal.,* 386 F.2d 962 (9th Cir. 1967), *cert. denied,* 390 U.S. 1011 (1968) *and cert. denied sub nom, Chandler v. United States,* 440 U.S. 927 (1979).

II. The United States Supreme Court should grant certiorari in order to determine if the non-use of a reasoned point scoring system in grading bar examinations, constitutes arbitrary conduct on behalf of a state's examining committee in derogation of an applicant's federal due process rights.

The Board maintains that the procedures utilized in the administration of the 1993 Delaware Bar Exam were

exemplary and rationally connected to Petitioner's fitness and capacity to practice law. The Board supports this contention by stating that Petitioner is challenging the general use of essay questions and that it is permissible to use essay questions, *Board Opp.* at 14-16. Again, the Board's logic is misplaced. Petitioner is not challenging the use of essay questions. The fact that the Board did not utilize a reasoned point scoring system in grading the 1993 bar examinations is uncontested. William J. Wade, Esq., Vice-Chairman of the Board, stated that a scoring guideline is not used, *Pet.* at 5. Petitioner's exam answers mirrored the selected answers that received much higher scores. And, the Board has never presented any evidence that it did utilize or consistently apply a specific point scoring formula in grading the 1993 exams.

The Board argues that an exam is not arbitrarily graded when the same Examiner regrades multiple times, the essay question he or she wrote and when the scores are given in five point increments, *Board Opp.* 5-6. The Board recognizes this as their only grading criteria. The Board asserts that this procedure constitutes a sufficient grading formula "and reduces the possibility of any grading inconsistencies," *Board Opp.* at 16-17. In contrast, see Stephen P. Klein, *Essay Grading: Fictions, Facts and Forecasts*, 54 THE BAR EXAMINER, August, 1985, at 23-24, wherein Dr. Klein, expert as recognized by the Board, *Board Opp.* at 7-8, footnote 2, discredits the *Bar Examiners' Handbook* recommendation that all answers to a particular question should be graded by the same reader. Klein explains that it is a misconception that one reader is better. He states that when this method is used, it often leads to grading practices that do not "satisfy basic professional standards for score reliability and fairness to applicants." *Id.* at 23.

In support of their argument, the Board relies on the case, *McGinn v. State Bar Bd. of the State of N.D.*, 399 N.W.2d 864 (N.D. 1987). The Board's reliance on *McGinn*, however, is inapposite for three reasons. First, the Board in *McGinn* utilized the equipercentile method of combining scores. Dr. Klein has recognized any method of combining scores as preferable than the multiple cut-off scoring system utilized in Delaware, see Stephen P. Klein, *Comparison of Rules for Combining Essay and MBE Scores*, 52 THE BAR EXAMINER, Feb., 1983, at 24-25, 28. Second, the North Dakota board utilized a system of regrading certain essays whereby different graders reviewed the original scores received. Thus, the Court concluded that because so many different individuals reviewed the applicant's scores and were in close agreement, the applicant could not establish that the exams were arbitrarily graded. This is not the system employed in Delaware. According to the Delaware Board, "each member who had primary responsibility for drafting those essay questions once again reviewed Petitioner's answers," *Board Opp.* at 6-7. Therefore, different graders did not review Petitioner's essay questions. Last, *McGinn* is clearly distinguishable because at the time of the North Dakota Supreme Court decision, the applicant had already been admitted to the practice of law in North Dakota.

In reading the Board's response, it appears that the Board does not understand the meaning of a grading formula. In Erica Moeser's article, *Amendments to Code of Recommended Standards for Bar Examiners*, 56 THE BAR EXAMINER, May, 1987, at 25, amendment 21 specifically states that "[b]efore an essay question is accepted for use every point of law in the question should be thoroughly briefed and the question should be analyzed

and approved by . . . the bar examining authority." Also, Stephen P. Klein has stated that:

> "A preliminary scoring guide for a question should be developed before the test is given. This helps to assure the question really measures what it is supposed to measure. For instance, do the persons who review the question agree with the guide? After the test is administered, the readers assigned to the question should also review the guide for appropriateness. This activity includes reading several answers to determine whether the question elicited the responses that were anticipated. If not, the scoring guide should be revised in a way that indicates how to handle common responses." Klein, *Essay Grading*, at 26.

Understandably, grading essay questions is inherently subjective, but the use of a specific Court-approved point scoring guide is the only way to restrain arbitrary grading. There is no system of checks and balances in Delaware. The Delaware Supreme Court is not statutorily required to approve of any grading formula. The Board has sole power to grade and review the exams as well as decide what will be tested and determine who will be admitted. See, RULES OF THE BOARD OF BAR EXAMINERS OF THE STATE OF DELAWARE, BR-52.4 and BR-52.6. Therefore, the Delaware Supreme Court and the Board acted arbitrarily when they did not utilize and consistently apply any kind of grading guide. They violated Petitioner's federal constitutional rights when they deprived her of the right to practice in a profession for which she is fully qualified.

III. The United States Supreme Court should grant

certiorari in order to dictate a policy enunciating what procedural safeguards should be afforded applicants denied a license based on their test performance.

The procedures utilized by the Delaware Supreme Court and the Board do not satisfy procedural due process requirements. The Board maintains that Petitioner was granted Board reconsideration and that her grade was raised to 64.17%, *Board Opp.* at 6-7. However, the Board later contradicts itself by stating that Petitioner was denied Board reconsideration, *Board Opp.* at 19. Petitioner was informed by the Board, only, that her petition for Board reconsideration was denied, see App., *infra*, c1. No explanation was given. Therefore, it is Petitioner's contention that since the Board cannot factually determine whether she was granted Board reconsideration, she was denied procedural due process at the state level.

Furthermore, the Board alleges that the denial of information sought by Petitioner and the denial of a hearing at the state level with respect to her examination does not violate due process. In support of their arguments the Board cites *Tyler, Whitfield, In re Pacheco,* 514 P.2d 1297 (N.M. 1973) and *Loeb v. New York State Bd. of Law Examiners,* 534 N.Y.S.2d 559 (N.Y. App. Div. 1988). These cases, however, are distinguishable from the present case because Delaware has a three time examination limitation. All the cases cited by the Board, with the exception of *Jones v. Board of Comm's of Alabama State Bar,* 737 F.2d 996 (11th Cir. 1984), specifically predicate their holdings i.e. denial of discovery and the denial of a hearing, on the fact that their jurisdictions allowed an applicant an unqualified right to retake the examination an unlimited number of times.

Even in the *Jones* case, the dissent severely criticized the majority's ruling when it relied on the *Tyler* line of cases. The dissent held that the majority deviated from binding precedent when an applicant was denied discovery and a hearing despite a five time exam limitation. The dissent declared that a five time exam limitation combined with the limited right to review violates due process, see *Jones*, at 1005.

> "Clearly this case should not have been dismissed on its complaint. A finding of no violation of due process, like any other finding, must be based on facts developed, argued, and analyzed. My position in this case is simply stated and supported by all of the law on the subject: Applicants who fail a state's bar examination must have either the right to full review of their examinations (a hearing), or have the right to unlimited times to retake the examination," *Jones*, at 1004-1005.

Moreover, the *Tyler* Court held that since the Georgia bar examination is given every six months, reexamination would provide quicker relief to "an erroneously failed applicant" than would a hearing, *Tyler,* at 1104. In Delaware, the bar exam is administered every twelve months. Therefore, in contrast to the situation in *Tyler*, reexamination in Delaware will not provide speedy relief to an applicant graded in an arbitrary manner.

In sum, the Board denied Petitioner procedural due process when it refused to grant Petitioner access to pertinent information regarding her exam. The Delaware Supreme Court denied Petitioner procedural due process when it rejected her appeal and denied her the right to a review.

IV. The United States Supreme Court should grant certiorari because Petitioner's due process rights were violated when Justice Joseph T. Walsh heard her case.

The Delaware Supreme Court and the Board claim that the disqualification entered by Justice Joseph T. Walsh in this case on December 7, 1993, *Pet.* at a5, was an error, *Delaware Supreme Court Opp.* at 3-4 and *Board Opp.* at 26-27. Moreover, the Board contends that Petitioner "cites no valid reason why Justice Walsh should have been disqualified from considering her petition, and in fact, no valid reason for such disqualification exists," *Board Opp.* at 27.

Despite the Board's assertions that the disqualification was erroneously entered, there was in fact a conflict. Justice Walsh's nephew, Peter J. Walsh, Jr., Esq., is a member of the Wilmington, Delaware law firm, Potter, Anderson and Corroon. Two members of the Board, James F. Burnett, Esq. and Michael D. Goldman, Esq., are likewise members of this same firm. The Delaware Supreme Court and the Board never disclosed any information regarding Justice Walsh's conflict. Petitioner was not able to discover the nature of the conflict before filing her Petition because this information was strictly within the purview of the Delaware Supreme Court and the Board. However, before the Respondents filed their responses, Petitioner was informed by an independent source that Justice Walsh did have a personal conflict. Upon request, Richard E. Fairbanks, Esq., Counsel of Record for the Delaware Supreme Court, confirmed this information on April 22, 1994.

Justice Joseph T. Walsh was under a statutory duty to either withdraw or disclose the nature of his personal

conflict and obtain the parties written consent before he decided to refuse Petitioner's appeal. See DELAWARE JUDGES' CODE OF JUDICIAL CONDUCT, Canon 3C(1)(d)(ii) and 3D. Thus, since he did neither, Justice Walsh violated the law and the Delaware Supreme Court acted in contravention of Petitioner's due process rights. In *In Re Murchison,* 349 U.S. 133, 136 (1955), the United States Supreme Court held that "a fair trial in a fair tribunal is a basic requirement of due process." In *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 825 (1986), this Court concluded that in order "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Aetna*, 475 U.S., at 825, citing *Murchison,* 349 U.S., at 136. Moreover, In *Tumey v. Ohio,* 273 U.S. 510, 523 (1927), this Court held that it is a violation of the Fourteenth Amendment due process clause when a person's liberty or property is subjected "to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Therefore, it is imperative that the United States Supreme Court assume jurisdiction over this matter in order to preserve public perception of judicial integrity.

CONCLUSION

For all the foregoing reasons, the petitioner for writ of certiorari should be granted.

Respectfully submitted,
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P.O. Box 142
Magnolia, DE 19962
(302) 335-5703
Petitioner, Pro Se

APPENDIX

BOARD OF BAR EXAMINERS
OF THE STATE OF DELAWARE

REPLY TO:
Josy W. Ingersoll, Esquire
Secretary, Board of Bar Examiners
P.O. Box 391
Wilmington, DE 19899-0391
(302) 571-6672

November 17, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Sharon Ann Ziegler
P.O. Box 142
Magnolia, DE 19962

Dear Ms. Ziegler:

I regret to inform you that the Board of Bar Examiners denied your petition for reconsideration of your grades on the July 1993 Bar Examination.

I direct your attention to Supreme Court Rule 52(f) which governs appeal to the Court from action by the Board.

Very truly yours,
/s/Josy W. Ingersoll
Secretary

JWI:cg
cc: Henry N. Herndon, Jr., Esquire
William J. Wade, Esquire
Donald E. Reid, Esquire